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16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA  
18 WESTERN DIVISION  
19

20 SMARTMETRIC INC.,

21 Plaintiff,

22 v.

23 MASTERCARD INTERNATIONAL  
INCORPORATED AND VISA INC.,

24 Defendants,  
25

26 AND RELATED COUNTERCLAIMS.  
27  
28

Case No. CV 11-7126 MWF (AJWx)

**DEFENDANTS' RESPONSE TO  
PLAINTIFF'S SECOND CITATION  
OF SUPPLEMENTAL  
AUTHORITY**

1 Defendants submit this response to the Second Citation of Supplemental  
2 Authority filed by Plaintiff SmartMetric, Inc. (D.I. 242). In the Second Citation,  
3 SmartMetric cites *Aviva Sports, Inc. v. Fingerhut Direct Marketing, Inc.*, 2015 U.S.  
4 Dist. LEXIS 9108, at \*5-\*6 (D. Minn. Jan. 27, 2015).

5  
6 The *Aviva* decision is a short, summary opinion that provides no helpful  
7 analysis whatsoever. After briefly outlining the Supreme Court's rulings in *Octane*  
8 *Fitness* and *Highmark*, the district court simply maintained its prior conclusion that  
9 the case was unexceptional without further discussion. It is unclear how *Aviva* helps  
10 SmartMetric.

11  
12 However, in the Second Citation SmartMetric does not confine itself to mere  
13 citation of subsequent (and unhelpful) authority. Instead, SmartMetric uses the  
14 occasion as an excuse to further argue that Defendants did not distinguish the present  
15 case from the *Kaneka* and *Realtime Data* cases that SmartMetric previously cited.  
16 (2d Citation at 1:27-2:9.) Once again SmartMetric apparently views itself as  
17 unconstrained by the rules and norms of patent litigation (if not all litigation) by  
18 rearguing positions briefed and argued to the Court without any consideration to the  
19 additional time and effort that Defendants and the Court must invest to parse the old  
20 arguments from the new. Certainly, it is improper and extraordinary for any litigant  
21 to simply ignore the Court's briefing and argument schedules and instead view each  
22 newly issued case as an opportunity to file new papers rearguing old positions.

23  
24 SmartMetric cited *Kaneka* and *Realtime Data* for the proposition that it is not  
25 "extraordinary" to continue to litigate a patent infringement case after receiving an  
26 adverse claim construction. In so arguing, SmartMetric overlooks that its  
27 unreasonable construction of "local access number" was not merely an isolated  
28 instance of SmartMetric pursuing a baseless argument. Rather, it was part of a

1 pattern of misconduct under which SmartMetric breached most of the obligations  
 2 borne by plaintiffs in patent cases: (1) SmartMetric failed to conduct reasonable and  
 3 adequate due diligence before filing suit; (2) SmartMetric failed to disclose its  
 4 infringement case to Defendants in discovery; and (3) SmartMetric failed to timely  
 5 serve its expert report on infringement and damages in violation of the case schedule.  
 6 These are the main obligations of a plaintiff-patentee in patent litigation.  
 7 SmartMetric thereby forced Defendants to first reveal their non-infringement  
 8 arguments, and then to disprove SmartMetric's evolving theories about Defendants'  
 9 alleged "control" over data cards and card readers. These facts clearly distinguish  
 10 this case from any of those cited by SmartMetric.

11  
 12 By almost any measure, SmartMetric's wholesale disregard of most of a  
 13 plaintiff's obligations in a patent case cannot be characterized as anything but  
 14 extraordinary.

15  
 16 Dated: February 11, 2015

17 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

18  
 19 By /s/ Gary A. Clark

20 GARY A. CLARK

21 Attorneys for Defendant and Counterclaimant  
 22 MASTERCARD INTERNATIONAL  
 INCORPORATED

23 Dated: February 11, 2015

24 JONES DAY

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 26 By /s/ Joseph Melnik

27 JOSEPH MELNIK

28 Attorneys for Defendant and Counterclaimant  
 VISA INC.

1 In accordance with Local Rule 5-4.3.4(a)(2), I hereby attest that all other  
2 signatories listed, and on whose behalf the filing is submitted, concur in the filing's  
3 content and have authorized the filing.

4 Dated: February 11, 2015

5 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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7 By /s/ Gary A. Clark

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